

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 333 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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CHHITABEN D/O LAKHABHAI                      VIRABHAI

Versus

JAYMALBHAI MACCHI PATEL THRO' HEIR UMIYABEN AND 5 ORS

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Appearance:

MR DN PANDYA for Petitioner

MR PN BAVISHI for Respondent No. 1

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CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 18/04/96

ORAL JUDGEMENT

1. This CRA is directed against the order passed by the Civil Judge (JD) Jhagadiya below Exh.32 in Reg.C.S.No.39/95. The application was filed by the respondent-plaintiff for appointment of Court Commissioner.

2. The suit is filed by the respondent-plaintiff for specific performance of agreement to sale. In said suit

the respondent-plaintiff have also preferred an application at Exh.5 interalia contending that the petitioner-defendant has by an agreement to sale agreed to sell the lands bearing Block Nos 161 & 86 and that the sale consideration was agreed to be at Rs.4,500/- out of which Rs.3,000/- were paid and in part performance of agreement the plaintiffs were put into possession of the land. It is their case that despite their readiness and willingness to perform their part of agreement the petitioner-defendant has failed to perform her part of agreement, and hence, suit for specific performance is filed. In the application at Exh.5 they have prayed for injunction restraining the petitioner-defendant from in anyway interfering with their possession over the suit plots. Such application at Exh.5 is tendered on 30th June, 1995 and is yet to be decided. The petitioner-defendant has filed written statement as well as reply to application-Exh.5 by filing the same at Exh.20. The petitioner-defendant has denied execution of any agreement to sale for amount of Rs.4,500/- on 4.1.1978 and has also denied receipt of Rs.3,000/- in cash. She has also denied the fact that the possession of the suit premises was handed over to the respondent-plaintiff. Such application-Exh.5 is yet to be finally heard and decided by the trial court. It appears that the respondent-plaintiffs have also initiated some proceedings for mutation of their names in the revenue record and in such revenue record some evidence is recorded. Based on some discrepancy in the evidence recorded before the revenue authority and the case pleaded before the Civil Court, an application was given by the respondent-plaintiff for appointment of Court Commissioner under Order 26 Rule 9 of C.P.Code. They have interalia averred it is also necessary to make spot investigation of property in question through the Court Commissioner so as to ascertain as to what crop is standing on the land in question and as to actual possession of the land in question.

3. Such application is resisted by the petitioner-defendant by filing reply at Exh.34.

4. The trial court has after hearing the parties and after narrating the contents of application-Exh.32 proceeded to record reasons in para 2 of the impugned order. The trial court has very categorically and clearly recorded that the court is not bound by the report of the Court Commissioner and that based on the report of the Court Commissioner alone whether the party is in possession of the suit premises can never be proved. This statement of law can not be doubted. The

court has thereafter proceeded to give reason that with a view to knowing the local condition or on the spot condition of the land in question, it is necessary to make panchnama or local investigation of the land through the Court Commissioner. The court has therefore appointed the Court Commissioner and granted the application, though not for the purpose for which the petitioner-plaintiff has applied for the appointment of the Court Commissioner.

5. Mr.D.N.Pandya, Ld.advocate appearing for the petitioner has submitted before this court that under Order 26 Rule 9 of C.P.Code the court has no jurisdiction to appoint the Court Commissioner to make local investigation with a view to creating evidence which would help the party in other proceedings and in the civil suit. There can not any dispute that if the Court Commissioner is to be appointed for the purpose of helping the respondent-plaintiff in the revenue proceedings the civil court can not pass such order of appointment of Court Commissioner. Though the averment in the application at Exh.22 would go to suggest that was the purpose for which appointment of court commissioner was sought, the trial court has not based its judgment on this averment. The trial court has, in fact, found that it is necessary to order a local investigation for the purpose of elucidating the matter in dispute between the parties. In fact, the trial court has categorically stated that the report of the Court Commissioner is not binding on it and it can not be used as evidence for the purpose of proving possession and that the parties shall have to prove their case independent of the report of the Court Commissioner. The court has felt the necessity of local investigation and has found that it is necessary for the purpose of elucidating and knowing as to what the local possession of the field is and for that purpose the Court Commissioner is appointed

6. In my opinion, it can not be said that the trial court has exceeded its jurisdiction vested in it by law under Order 26 Rule 9 C.P.C. Secondly, the order as a discretionary order it can not be said that the court has exercised the discretion illegally or based on some irrelevant or extraneous factors. Mr.Pandya has invited the attention of this court to the decision of the learned single judge of this court in CRA No.1165/78 decided on 19.9.78 part of which is reported in 15 GLT 279. The learned single has in the said case found that ordinarily the rule of law is that the appointment of Commissioner should be made by the Court after hearing both the parties. The exparte order of appointing Court

commissioner can only be made when there is imminent danger likely to visit the party applying for ex parte appointment of Court Commissioner. The court also observed that it is not the function of the Court Commissioner to create evidence for the party. Local inspection or local investigation can only become appreciation of evidence which may be on record. It can not be a substitute for a substantive piece of evidence.

7. In my opinion, the aforesaid judgment and observations of the learned single judge do not at all run counter to the conclusion reached by the trial court. The trial court has categorically found that the report of the Court Commissioner can not be and is not the evidence of possession. It has also found that independent of the report of the Court Commissioner the parties shall have to prove their case by their own evidence. Statement of law is stated by the learned single judge of this court in the aforesaid case. It is therefore wrong to say that the discretion exercised by the trial court is against principles of law propounded by this court. The trial court has justly and on reasonable ground reached the conclusion and has exercised discretion. In view of the aforesaid I do not find any substance in the submission of Mr. Pandya, Ld. advocate for petitioner.

8. However, it is clarified Mr. Baxi, Ld. advocate for respondent has no objection that the report which the court commissioner may prepare shall not be used for the purpose of revenue proceedings and the revenue proceedings for mutation of entry shall be stayed till the trial court decides application-Exh.5, and that the plaintiff shall apply for stay of such proceedings. The court commissioner shall submit his report only confining to the prayers made in the application and not beyond the prayer made in the application. Rule is made absolute accordingly. No costs.

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